

(28)

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

FILED OFFICE OF  
ADMIN. HEARINGS IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
93 EHR 1021

Dec 20 4 40 PM '93

HEATCRAFT INC.,

Petitioner,

v.

N.C. DEPARTMENT OF ENVIRONMENT,  
HEALTH AND NATURAL RESOURCES,  
HAZARDOUS WASTE SECTION,

Respondent.

FINAL DECISION/ORDER OF  
DISMISSAL

This matter came on for consideration before the undersigned pursuant to Respondent's Motion to Dismiss filed on October 27, 1993 in which Respondent moved for dismissal of the Petitioner's contested case pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction. Petitioner filed a response on November 9, 1993. Oral argument was held by telephone conference in this matter on December 13, 1993. Ms. Judith Robb Bullock appeared on behalf of the Respondent, N.C. Department of Environment, Health and Natural Resources, Hazardous Waste Section. Mr. T. Richard Kane appeared on behalf of Petitioner, Heatecraft, Inc.

After consideration of Respondent's Motion and Petitioner's response and the oral arguments of the parties, the undersigned finds as follows:

1. Petitioner and Respondent voluntarily entered into an Administrative Order on Consent (AOC) on or about April 18, 1989 in which Petitioner agreed to remediate environmental contamination which existed at its site in accordance with certain hazardous waste laws and regulations administered by the Respondent.
2. Over a period of time, Petitioner came to believe that

the Respondent did not have the legal authority to administer its hazardous waste laws and regulations at Petitioner's site.

3. Prior to the filing of the contested case petition, Petitioner informed the Respondent that, in its opinion, the AOC was void and without legal effect.
4. Petitioner filed a petition for contested case hearing on September 22, 1993 in the Office of Administrative Hearings in which it sought to have the AOC declared null and void.
5. The signing of the AOC by Petitioner and Respondent on or about April 18, 1989, and Respondent's actions thereafter, do not constitute an agency action sufficient to form the basis of a "contested case" as defined in North Carolina Gen. Stat. § 150B-2(2) because the AOC is a voluntary agreement. Further, to the extent that entry into the AOC was an agency action sufficient to give rise to a contested case, the filing of a contested case petition over 4½ years after the signing of the AOC cannot be considered timely.
6. Petitioner is not a "person aggrieved" as that term is defined in North Carolina Gen. Stat. § 150B-2(6) because it has not been directly or indirectly affected substantially in its person, property or employment by an administrative decision. There is no administrative decision which can be the subject of a contested case in this matter. Petitioner has withdrawn from the AOC and the AOC is no longer effective as a Consent Order. Respondent indicated that Petitioner has complied with the terms of the AOC to date.

Based on the foregoing, the undersigned concludes that there is no current dispute between the Petitioner and the Respondent which can properly constitute a contested case. At such time as the Respondent may choose to initiate an enforcement action, such as the issuance of a compliance order with administrative penalty, for any violation of law or applicable regulations, the Petitioner will be able to contest such action by filing a petition for a contested case.

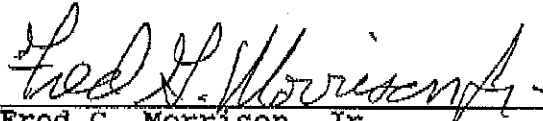
ORDER

Accordingly, the Respondent's Motion to Dismiss is GRANTED and this case is DISMISSED. This Order is a final decision issued pursuant to North Carolina Gen. Stat. § 150B-36(c)(4).

NOTICE

In order to appeal a Final Decision, the person seeking review must file a Petition in the Superior Court of Wake County or in the superior court of the county where the person resides. The Petition for Judicial Review must be filed within thirty (30) days after the person is served with a copy of the Final Decision. North Carolina Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties.

This the 20th day of December, 1993.

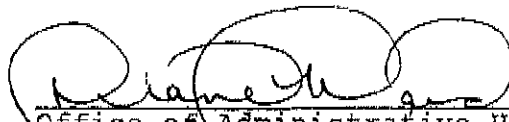
  
Fred G. Morrison, Jr.  
Senior Administrative Law Judge

A copy of the foregoing was mailed to:

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NC Dept of Justice  
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Attorney for Respondent

This the 20<sup>th</sup> day of December, 1993.



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